No. SC94277

IN THE

Supreme Court of Missouri

CHARLES K. MOORE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the St. Francois County Circuit Court
Twenty-fourth Judicial Circuit
The Honorable Sandy Martinez, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Moore appeals the denial of his Rule 29.15 motion, in which he alleged that his trial attorneys were ineffective for withdrawing a motion for an automatic change of judge and for failing to move for a change of judge for cause (PCR L.F. 26). Mr. Moore's motion alleged that Mr. Moore told his attorneys that he "wanted a different judge, because Judge Martinez had been involved in prosecuting his 1998 robbery case out of Washington County" (PCR L.F. 26). The motion court denied Mr. Moore's post-conviction motion without an evidentiary hearing (PCR L.F. 33-35).

* * *

A jury found Mr. Moore guilty of the class C felony of assault of a probation and parole officer in the second degree. *See State v. Moore*, 362 S.W.3d 509, 510 (Mo.App. E.D. 2012) (per curiam order). The trial court sentenced Mr. Moore, as a persistent offender, to fifteen years' imprisonment (Tr. 158; L.F. 53). In brief, the evidence was presented at trial, as follows.

On April 28, 2010, during a meeting with his parole officer, Mr. Moore became "extremely angry" (Tr. 91, 93). He exhibited "dangerous behaviors" (Tr. 93). He stared fixedly at the floor, shaking and twitching, and he angrily pounded the officer's desk with his fist (Tr. 93, 96). The officer feared for his safety, and he believed than an "attack was imminent" (Tr. 97, 103).

The officer tried to defuse the situation, but when that failed, the officer directed Mr. Moore to leave his office (Tr. 93, 96). The officer also grabbed his pepper spray because he "felt threatened" (Tr. 94). Mr. Moore was uncooperative as the officer attempted to escort him to the lobby, and he was "yelling and cussing" at the officer and other probation and parole employees (Tr. 94-95, 97).

A surveillance video showed Mr. Moore pacing around the lobby for two minutes before striking a chair and hurling it across the room (State's Ex. 2:09:44-2:11:47). He continued to yell and scream (Tr. 98). The parole officer and others entered the lobby to escort another client out of the "area of danger" (Tr. 99). The officer also righted the chair Mr. Moore had tossed, and as the officer walked away, Mr. Moore kicked the chair at him (State's Ex. 2:12:22). Mr. Moore then tried to strike the officer in the face with his fist (Tr. 102; *see* State's Ex. 2:12:23-2:12:24). The officer believed that Mr. Moore was going to cause him serious physical injury (Tr. 102, 105).

On direct appeal, the Court of Appeals affirmed Mr. Moore's conviction and sentence. *State v. Moore*, 362 S.W.3d at 510. The Court of Appeals issued its mandate on April 18, 2012.

On June 20, 2012, Mr. Moore filed a *pro se* post-conviction motion pursuant to Rule 29.15 (PCR L.F. 3). Thereafter, with the assistance of counsel, Mr. Moore filed an amended motion, in which he alleged that counsel

was ineffective for withdrawing a motion for automatic change and for failing to file a motion for change of judge for cause (PCR L.F. 26).

On December 10, 2012, the motion court denied Mr. Moore's post-conviction motion without an evidentiary hearing (PCR L.F. 33-35). The motion court observed that the trial court had, at sentencing, asked Mr. Moore about his allegation that he wanted the judge disqualified (PCR L.F. 34). The motion court stated that defense counsel had said at sentencing that the motion for change of judge had been withdrawn (PCR L.F. 34).[1] The motion court stated that the court's file indicated that "the motion to withdraw [sic] was withdrawn in [Mr. Moore's] presence and with his consent in open court September 3, 2010" (PCR L.F. 34).[2]

The motion court also concluded that Mr. Moore had failed "to allege prejudice sufficient to trigger relief" (PCR L.F. 34). The motion court observed that "cases have repeatedly held that simply because a trial judge may have

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[1] The transcript reflects that defense counsel stated, "At the time that [Mr. Moore's first attorney] talked to him she indicated in the file that he did not request a change of judge" (Tr. 168).

[2] A docket entry on that date indicated that Mr. Moore was present in court, and it stated, "Defendant's Motion to Withdraw, Motion for Change of Judge, sustained" (L.F. 2).

received knowledge of facts through prior court hearings involving the defendant, the judge need not disqualify themselves for cause" (PCR L.F. 34, citing *State v. Berry*, 798 S.W.2d 491, 496 (Mo.App. S.D. 1990)). The motion court concluded that Mr. Moore had not alleged "any objective facts that would necessitate disqualification" (PCR L.F. 34).

Mr. Moore appealed, and, on April 22, 2014, the Court of Appeals reversed and remanded Mr. Moore's case for an evidentiary hearing to determine whether trial counsel was ineffective for failing to move for a change of judge. *State v. Moore*, No. ED99603, slip op. 6-7. With regard to Mr. Moore's claim that counsel should have moved for an automatic change of judge, the Court of Appeals concluded, "Had defense counsel not withdrawn the motion, Movant was entitled to, and would have had, a change of judge." *Id*. at 6. With regard to Mr. Moore's claim that counsel should have moved for a change of judge for cause, the Court of Appeals observed that Mr. Moore had alleged that "a reasonable person would find an appearance of impropriety and doubt the impartiality of a judge who had prosecuted Movant in a separate case, and who sentenced him to the maximum 15 year term to run consecutively to a previously imposed sentence." *Id*. at 7.

This Court granted the State's application for transfer.

ARGUMENT

I.

The motion court did not clearly err in denying Mr. Moore's claim that trial counsel was ineffective for withdrawing a motion for an automatic change of judge and for failing to move for a change of judge for cause. (Responds to Points I and II of appellant's brief.)

In his first point, Mr. Moore asserts that trial counsel was ineffective for withdrawing a motion for automatic change of judge that had been filed before trial (App.Sub.Br. 13). He asserts that he was prejudiced because "a change of judge under Rule 32.07 would have been automatic and his case would have been heard before a judge who had not previously prosecuted him" (App.Sub.Br. 13).

In his second point, Mr. Moore asserts that trial counsel was ineffective for failing to move for a change of judge for cause (App.Sub.Br. 22). He asserts that he was prejudiced by this alleged error because "a reasonable person would doubt the impartiality of a judge who had previously prosecuted the defendant, and that judge, in fact, sentenced him to the maximum 15-year term allowable by law, consecutive to a previously-imposed sentence" (App.Sub.Br. 22).

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to

a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id*.

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id*.

B. Mr. Moore failed to allege facts showing that trial counsel was ineffective

To prevail on a claim of ineffective assistance of trial counsel, a movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also show prejudice from counsel's alleged error. *Id*. at 694. To show prejudice, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*.

1. The motion court findings and conclusions

In denying Mr. Moore's claim, the motion court observed that the trial

court had, at sentencing, asked Mr. Moore about his desire to have the judge disqualified (PCR L.F. 34). The motion court observed that defense counsel had said then that the motion for change of judge had been withdrawn (PCR L.F. 34). The motion court stated that the file indicated that "the motion to withdraw [sic] was withdrawn in [Mr. Moore's] presence and with his consent in open court September 3, 2010" (PCR L.F. 34). (A docket entry on that date indicated that Mr. Moore was present in court, and it stated, "Defendant's Motion to Withdraw, Motion for Change of Judge, sustained" (L.F. 2).)

The motion court further concluded that Mr. Moore had failed "to allege prejudice sufficient to trigger relief" (PCR L.F. 34). The motion court observed that "cases have repeatedly held that simply because a trial judge may have received knowledge of facts through prior court hearings involving the defendant, the judge need not disqualify themselves for cause" (PCR L.F. 34, citing *State v. Berry*, 798 S.W.2d 491, 496 (Mo.App. S.D. 1990)). The motion court concluded that Mr. Moore had not alleged "any objective facts that would necessitate disqualification" (PCR L.F. 34).

2. Mr. Moore failed to allege facts showing that counsel's performance fell below an objective standard of reasonableness

In his amended motion, Mr. Moore alleged that counsel was ineffective for "filing, and then withdrawing, a motion to change judge that Mr. Moore wished to be filed" (PCR L.F. 26). The motion alleged that Mr. Moore told

counsel that he wanted a change of judge because the judge "had been involved in prosecuting his 1998 robbery case out of Washington County" (PCR L.F. 26).

The motion did not allege, however, that counsel lacked a strategic reason for withdrawing the motion; rather, the motion alleged merely that counsel would testify about notations she made in her notes and "*whether* Mr. Moore wanted an automatic change of judge" (PCR L.F. 27) (emphasis added). The motion did not allege that counsel would testify that Mr. Moore actually wanted a change of judge on the day the motion was withdrawn (PCR L.F. 27).

Absent any allegation that counsel's decision was not made pursuant to a reasonable trial strategy, it should be presumed that counsel had a strategic reason for withdrawing the motion. "A movant must overcome the strong presumption defense counsel's conduct was reasonable and effective." *McIntosh v. State*, 413 S.W.3d 320, 324 (Mo. 2013). Here, a docket entry indicated that counsel initially filed a motion for change of judge but that counsel then moved to withdraw the motion for change of judge the same day (L.F. 2). The mere fact that Mr. Moore stated a desire for a change of judge at some point was not sufficient to show that counsel lacked a strategic reason in withdrawing the motion for a change of judge. "Whether to file a motion to disqualify a judge is a matter of trial strategy." *Prince v. State*, 390 S.W.3d

225, 237 (Mo.App. W.D. 2013).

Additionally, at sentencing, trial counsel stated that Mr. Moore's first attorney had withdrawn the motion for change of judge because, as she had indicated in her file, Mr. Moore "did not request a change of judge" (Tr. 168). Thus, Mr. Moore's post-conviction claim regarding his first attorney's conduct was refuted by the record. As the motion court stated, it appeared from the record that Mr. Moore consented to counsel's decision to withdraw the motion for change of judge. Accordingly, Mr. Moore should not now be heard to complain. *See id.* (where the defendant opted not to seek a change of judge, "he ha[d] no room to now complain that this strategy somehow failed").

The amended motion also did not allege that trial counsel lacked a strategic reason for not later filing a motion for change of judge for cause. The amended motion alleged that a change of judge for cause "is allowed," but it did not allege that counsel lacked a strategic reason for refraining from seeking one (PCR L.F. 26-28). Thus, the amended motion did not allege facts overcoming the strong presumption that counsel made all decisions according to a reasonable trial strategy.[3]

Mr. Moore asserts that "the motion for change of judge was inexplicably

[3] A portion of the amended motion is missing from the legal file, apparently due to an error during facsimile transmission (*see* PCR L.F. 27-28).

withdrawn" (App.Sub.Br. 18). He then asserts that "[t]he only real question is why the motion was withdrawn" (App.Sub.Br. 18). Similarly, in Point II, Mr. Moore asserts that "[a]n evidentiary hearing is necessary so Mr. Moore's trial attorneys can testify concerning their reasons—or lack of reasons—for failing to seek a change of judge for cause" (App.Sub.Br. 24). But to be entitled to an evidentiary hearing to resolve those questions, it was incumbent upon Mr. Moore to first allege facts showing that counsel did not have a strategic reason. "An evidentiary hearing is not a means by which to provide movant with an opportunity to produce facts not alleged in the motion." *State v. Brooks*, 960 S.W.2d 479, 497 (Mo. 1997).

3. Mr. Moore failed to allege facts showing prejudice

With regard to counsel's withdrawing the motion for an automatic change of judge, Mr. Moore asserts that he was prejudiced because "but for counsel's actions that only a hearing can explain, Mr. Moore was entitled to, and would have had, a change of judge" (App.Sub.Br. 20). He further asserts, "Had [his] application for automatic change of judge not been withdrawn, we know he would have been tried and sentenced before a judge who had *not* prosecuted him for two robberies previously" (App.Sub.Br. 20). But neither of these arguments show *Strickland* prejudice.

With regard to Mr. Moore's first argument, it is true that a timely motion for change of judge pursuant to Rule 32.07 must be granted. *See State*

ex rel. Joyce v. Baker, 141 S.W.3d 54, 56 (Mo.App. E.D. 2004). But the mere fact that there would have been an automatic change of judge is not sufficient to establish *Strickland* prejudice. To show prejudice on a claim of ineffective assistance of counsel, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. at 693.

Here, Mr. Moore failed to allege any facts showing a reasonable probability that an automatic change of judge would have affected the outcome of his case (either in guilt or penalty phase). Under *Strickland*, in evaluating how counsel's errors might have affected the verdict or sentence imposed, reviewing courts "should presume . . . that the judge or jury acted according to law." *Id*. at 694. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id*. at 695.

Mr. Moore has not identified anything that a different judge would have done in his case that would have given rise to a reasonable probability of a different result in his case. As such, he failed to allege facts showing prejudice from counsel's withdrawing the motion for an automatic change of judge—even if counsel's action was unreasonable. "An error by counsel, even

if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691; *see generally Matthews v. State*, 175 S.W.3d 110, 113-115 (Mo. 2005) (the defendant was not entitled to an evidentiary hearing on his claim that counsel failed to object to the trial court's improper denial of a motion for automatic change of venue because the defendant "did not plead any indication of actual prejudice stemming from his counsel's failure to object"); *Hightower v. State*, 1 S.W.3d 626, 627-629 (Mo.App. S.D. 1999) (counsel's failing to seek an automatic change of venue was not prejudicial because the defendant could not show that any juror was actually biased against the defendant).

In *Matthews v. State*, 175 S.W.3d at 114-115, this Court rejected the defendant's claim that "he need not show any actual prejudice" from counsel's failing to seek an automatic change of venue under Rule 32.03. The defendant argued "that prejudice is presumed simply from the fact that he was denied the change of venue provided for by Rule 32.03." *Id.* at 114. But the Court held that Rule 32.03 does not create any presumption of prejudice. *Id.* (citing *Moss v. State*, 10 S.W.3d at 513). Rather, the rule " 'merely recognizes [that] a defendant's ability to secure a fair trial in small counties is often contested and affords a defendant the right to change venue as a matter of convenience.' " *Id.* In addition, as this Court stated in *Moss*, the

time limit for seeking an automatic change of venue under the rule was not consistent with any presumption of prejudice. *Moss*, 10 S.W.3d at 514.

There is no reason to treat an automatic change of judge under Rule 32.07 any differently in evaluating claims of ineffective assistance of counsel. There should be no presumption that a judge is prejudiced, and the rule should not be construed in that fashion. To the contrary, "[a] judge is entitled to the presumption that he will not preside at a trial in which he cannot be impartial." *State v. Ayers*, 911 S.W.2d 648, 651 (Mo.App. S.D. 1995). Accordingly, Rule 32.07 should be viewed as providing a convenient (but time limited) means of obtaining a change of judge without a contested hearing.[4] And, as such, it is not sufficient to show prejudice—when asserting a claim of ineffective assistance of counsel—to show merely that counsel's alleged error deprived the defendant of an automatic change of judge.

Mr. Moore's other argument—namely, that he "would have been tried

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[4] Mr. Moore asserts that "[t]he State will argue that no possible prejudice can come from ignoring, at an intake interview, a defendant's wishes about an automatic change of judge" (App.Sub.Br. 20). But that is not the State's argument. There might be circumstances where such an alleged error would result in *Strickland* prejudice (*e.g.*, where a judge is, in fact, biased against the defendant). Here, however, Mr. Moore did not allege such facts.

and sentenced before a judge who had *not* prosecuted him for two robberies previously" (App.Sub.Br. 20)—also fails to establish prejudice. In making this argument, Mr. Moore seemingly implies that his trial judge was, in fact, biased against him and that, consequently, there is a reasonable probability that a different judge would have imposed a shorter sentence.

But Mr. Moore's amended motion did not allege that there was any actual bias on the part of the trial judge (it alleged merely that the judge had been "involved" in a prosecution twelve years earlier (PCR L.F. 26)), and it did not allege a reasonable probability that a different judge would have imposed a shorter sentence if an automatic change of judge had been granted. In short, any suggestion that a different judge might have imposed a shorter sentence is too speculative to sustain a claim of *Strickland* prejudice. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland*, 466 U.S. at 695. Thus, "evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination." *Id*.

Mr. Moore's additional claim that counsel should have moved for a change of judge for cause was similarly deficient in alleging prejudice. Mr. Moore asserts in his second point that he was prejudiced because the judge "sentenced [him] to the maximum sentence of 15 years," which was "higher

than the State's recommendation of 10" (App.Sub.Br. 25). He also points out that the judge ordered his sentence to run consecutively to another sentence (App.Sub.Br. 25). But any judge could have sentenced Mr. Moore to the same sentence, and, as stated above, there was no allegation that the judge was actually biased against Mr. Moore or that there was a reasonable probability that a different judge would have imposed a shorter sentence.

Mr. Moore points out that, ordinarily, to obtain a change of judge, it is not necessary to prove actual bias (App.Sub.Br. 23-24). He asserts that "the existence or nonexistence of actual bias against the defendant is not the benchmark for determining whether a judge should be disqualified or recused" (App.Sub.Br. 24, citing *State v. Smulls*, 935 S.W.2d 9, 24 (Mo. 1996)). He asserts, "A judge should be disqualified if a reasonable person would doubt the impartiality of the court" (App.Sub.Br. 24, citing *State v. Whitfield*, 939 S.W.2d 361, 367 (Mo. 1997)).

But while these principles apply in ascertaining whether a trial court or motion court erred in refusing to recuse in a case, they do not govern the analysis in evaluating a claim of ineffective assistance of counsel. On a claim of ineffective assistance of counsel, to demonstrate prejudice, a movant must show a reasonable probability of a different result. *Strickland*, 466 U.S. at 694. It is not sufficient to show merely that the judge's role in the case might have undermined "public confidence" in the criminal justice system

(App.Sub.Br. 23). Preserving public confidence in the criminal justice system is, to be sure, critically important; but on collateral review of a judgment, in evaluating a claim of ineffective assistance of counsel, the competing interest of finality requires a showing of actual prejudice as set forth in *Strickland*.

In other words, to demonstrate prejudice in this context, a defendant should be required to prove, at the least, that a motion for change of judge for cause would have been warranted due to actual bias on the part of the judge. *See generally Phillips v. State*, 356 S.W.3d 179, 185 (Mo.App. E.D. 2011) ("Counsel cannot be found to be ineffective for failing to file a meritless motion . . . so Movant must establish that his motion for change of judge would have been granted."). And, here, Mr. Moore did not allege that the trial judge had an actual bias that would have required recusal.

Finally, even if trial counsel should reasonably file a motion for change of judge for cause in any case "where the judge's impartiality might reasonably be questioned," *see id*, Mr. Moore failed to allege facts showing that trial counsel failed in that regard. Under that standard, "[t]he test . . . is whether a reasonable person would have a factual basis to doubt the judge's impartiality." *Id*.

" 'Specifically, a disqualifying bias or prejudice is one that has an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from the judge's participation in a case.' "

Id. (quoting *Worthington v. State*, 166 S.W.3d 566, 579 (Mo. 2005)). "The common thread in cases requiring recusal 'is either a fact from which prejudgment of some evidentiary issue in the case by the judge may be inferred or facts indicating the judge considered some evidence properly in the case for an illegitimate purpose.' " *Id.* (quoting *Haynes v. State*, 937 S.W.2d 199, 203-04 (Mo. 1996)). " 'There is a presumption that a judge acts with honesty and integrity and will not preside over a trial in which he or she cannot be impartial.' " *Id.* (quoting *Worthington*, 166 S.W.3d at 579).

Here, the sole allegation in the amended motion was that the judge "had been involved in prosecuting [Mr. Moore's] 1998 robbery case out of Washington County" (PCR L.F. 26). The motion did not allege any other facts. It did not allege what role the judge had played in the prosecution in Washington County, or whether the judge's involvement in the case was substantial or trivial. The motion did not allege that the judge had learned any fact in that case that was pertinent in the present case (and not a matter of public record). Moreover, the Washington County case had been prosecuted about twelve years earlier, and there was no indication that the judge even recalled being "involved" in it. To the contrary, at sentencing, the judge stated, "the Court will note that this is the very first time that that issue has been raised before the Court" (Tr. 168).

In short, the bare allegation that the judge had been "involved" in a

prosecution approximately twelve years earlier did not provide a sufficient basis to reasonably doubt the judge's impartiality in this case. Accordingly, if trial counsel had filed a motion for a change of judge for cause, there is no reasonable probability that the trial judge would have recused. *See People v. Flockhart*, 304 P.3d 227, 237-238 (Colo. 2013) (although the judge had prosecuted the defendant seven years earlier on similar charges, the judge was not required to recuse: "we are unwilling to adopt a per se rule requiring disqualification in every instance in which a presiding judge, as a former prosecutor, brought unrelated criminal charges against the defendant in the past. Absent facts demonstrating some material relationship between the two proceedings, or facts showing that the past prosecution is relevant to the current case, disqualification is not invariably required."); *Leverette v. State*, 732 S.E.2d 255, 257 (Ga. 2012) ("the fact that a judge in the judge's previous capacity as district attorney prosecuted the defendant on *another* charge not currently pending before the judge, is not, standing alone, a ground for disqualification."); *see also Smulls v. State*, 10 S.W.3d 497, 501 (Mo. 2000) (the judge was not required to recuse where the judge's son worked for the prosecutor's office and the prosecutor and the judge had previously worked for the same firm: "Judge O'Brien's prior professional relationships are too attenuated to create even the appearance of impropriety"). Mr. Moore's claims should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Moore's Rule 29.15 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 4,637 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 17th day of October, 2014, to:

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